



Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others (Petition 42 of 2019) [2021] KESC 35 (KLR) (24 March 2021) (Judgment)

Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others [2021] eKLR

Neutral citation: [2021] KESC 35 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 42 OF 2019

PM MWILU, AG.CJ & AG. P, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

MARCH 24, 2021

BETWEEN

KENYA VISION 2030 DELIVERY BOARD APPELLANT

AND

THE COMMISSION ON ADMINISTRATIVE JUSTICE 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

ENG. JUDAH ABEKAH 3RD RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal at Nairobi (Nambuye, Kiage & Murgor) in Civil Appeal No. 141 of 2015 delivered on 27th September 2019)

Recommendations made by the Commission on Administrative Justice to public bodies are not binding

Reported by Beryl Ikamari

Constitutional Law - constitutional commissions - Commission on Administrative Justice (CAJ) - mandate and powers of CAJ - whether the recommendations made to public bodies by CAJ were binding - Constitution of Kenya 2010, article 254; Commission on Administrative Justice Act (cap 7J) section 43(3).

Judicial Review - unfair administrative action - remedies - damages - whether the Court of Appeal had jurisdiction to award damages in a judicial review appeal, where the damages were a remedy sought for a failure to implement the recommendations of the Commission on Administrative Justice .

Evidence Law - burden of proof - burden of proof in cases of abuse of discretion by public officers - who bore the burden of proof in cases of abuse of discretion by public officers where exceptional circumstances were pleaded.

Brief facts

The 3rd respondent was employed under a three-year employment contract by the Kenya Vision 2030 Delivery Board (the Board) in the position of Director. The contract was renewable six months before its expiry. The 3rd



respondent's employment contract was not renewed on grounds that his performance was below par. The 3rd respondent appealed to the Minister for Planning and National Development and Vision 2030 (the Minister). The Minister renewed his contract for a year but the Board declined to allow him back to work.

The 3rd respondent then sought the assistance of the Commission on Administrative Justice (CAJ). The conclusions of CAJ were that the Board violated articles 47 and 59 of the Constitution of Kenya, 2010 (Constitution) as well as sections 2 and 8(a), (b), and (d) of the Commission on Administrative Justice Act on fair administrative action. CAJ recommended the Board to pay the respondent the equivalent of twelve months' salary and allowances in compensation for the one-year period of the reviewed contract, to allow the 3rd respondent to collect his personal effects from his former office and offer him an unconditional apology for how they had treated him. The Board declined to implement the recommendations and CAJ filed judicial review proceedings at the High Court.

The High Court's findings were that it could not compel the implementation of CAJ's recommendations and that the only thing that CAJ could do when an organization failed to implement its recommendations was to make a report to the National Assembly which would take appropriate action under section 44(4) of the Commission on Administrative Justice Act. Generally, the High Court stated that since CAJ lacked coercive power to compel the implementation of its recommendations, the court could also not compel a Government agency to implement the recommendations. An exception to those rules which would allow the court to compel the implementation of such recommendations was where there was a gross abuse of discretion, manifest injustice or palpable excess of authority equivalent to a denial of a settled right to which the petitioner was entitled, and there was no other plain, speedy and accurate remedy. An appeal was lodged against the High Court's decision.

The Court of Appeal allowed the appeal and granted the orders of *mandamus* as sought and also monetary compensation for violation of fair administrative action rights. The Court of Appeal stated that CAJ's options in situations where its recommendations were not implemented were not limited to reporting to the National Assembly. It explained that article 254 of the Constitution did not suggest that recommendations had no force of law or were incapable of enforcement by a court of law.

Issues

- i. Whether the recommendations of the Commission on Administrative Justice were binding on public bodies.
- ii. Whether the Court of Appeal had jurisdiction to award damages in a judicial review appeal, where the damages were a remedy sought for a failure to implement the recommendations of the Commission on Administrative Justice.
- iii. Who bore the burden of proof in cases of abuse of discretion by public officers where exceptional circumstances were pleaded?

Held

1. Section 5 of the Commission on Administrative Justice Act implied that the powers conferred upon CAJ were in addition to the power of commissions in article 253 of the Constitution. Like any other constitutional commission, CAJ was required as soon as practicable, after the end of each financial year, to submit a report to the President and to Parliament. It was wrong for the Court of Appeal to conclude that the report required under article 254(1) of the Constitution was different from reporting on its investigative reports made in the discharge of its mandate.
2. A reading of section 8 of the Commission on Administrative Justice Act which set out the functions of CAJ indicated that CAJ was mandated to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector. Therefore, CAJ had the mandate to entertain and make recommendations with regard to the 3rd respondent's complaint.
3. Section 29 of the Commission on Administrative Justice Act provided that after investigating a complaint about how administrative action had been undertaken by a public officer or public body,



- CAJ was under a mandatory obligation to resolve the complaint through conciliation, mediation or negotiation. If the matter could not be resolved, and CAJ found that administrative action was undertaken unjustly or unreasonably, CAJ would make recommendations as it deemed fit.
4. Whereas CAJ had the requisite mandate to make recommendations to public officers or public bodies, the recommendations were not binding. A recommendation could only be binding when its binding nature was specifically provided for under the Constitution or the law. Neither the Constitution nor the Commission on Administrative Justice Act provided that CAJ's recommendations were binding. Consequently, the Board had the discretion to determine the manner in which they were to implement CAJ's recommendations.
 5. Under section 42(4) of the Commission on Administrative Justice Act, the remedy where there had been non-compliance with the recommendations of the CAJ, was for the CAJ to prepare a report of the Board's failure to implement the recommendations to the National Assembly for appropriate action. Not even a court of law could dictate the manner in which a CAJ recommendation should be implemented. The only exception was where there was a gross abuse of discretion, manifest injustice or palpable excess of authority equivalent to a denial of a settled right to which the aggrieved party was entitled and there was no other plain, speedy and accurate remedy. The 3rd respondent's circumstances did not fall within the exception.
 6. Where exceptional circumstances were pleaded, the party aggrieved by the alleged abuse of discretion by a public officer, had to prove that the exceptional circumstances existed. The 3rd respondent did not discharge that burden of proof.
 7. The following were the guiding principles on recommendations from commissions to public bodies: -
 - a. Any power to make a recommendation ought to be specifically provided for in the Constitution or in law.
 - b. Recommendations did not necessarily bind the person to whom, or entity to which, it was addressed.
 - c. A recommendation from a commission was only binding upon a public entity where it has been specifically provided for in the Constitution or in law.
 - d. The manner in which a recommendation was to be implemented by a public entity was discretionary.
 - e. Exercise of discretion in implementing a recommendation could only be interfered with where there was a gross abuse of discretion, manifest injustice or palpable excess of authority.
 - f. Any recommendation by a commission that was not implemented could be reported to Parliament for any further action, if necessary.
 8. Since CAJ's recommendations were not binding on the Board, there was no basis for the Court of Appeal to award monetary compensation to the 3rd respondent.
 9. Under section 8(c) of the Commission on Administrative Justice Act, CAJ had the mandate to award compensation but that provision should not be read in isolation. Section 41 of the Commission on Administrative Justice Act provided for options that CAJ had after the conclusion of an inquiry. They included referring the matter to the relevant authority (which included the National Assembly) or recommending to the 3rd respondent a course of other judicial redresses, recommending to the complainant appropriate methods of settling the complaint or obtaining relief and providing a copy of the inquiry report to all interested parties or submitting summons as it deemed fit to fulfill its mandate.
 10. Since the dispute was an employer-employee dispute, CAJ ought to have recommended to the 3rd respondent an appropriate method of settling the dispute. One of those methods would be to seek redress at the Employment and Labour Relations Court (ELRC).
 11. CAJ could not usurp the role of the ELRC over employment disputes and award compensation. CAJ, under section 8(g) of the Commission on Administrative Justice Act, could only recommend compensation or other appropriate remedies against a person or bodies to which the Act applied.



Appeal allowed.

Orders

- i. The petition of appeal dated November 6, 2019 and filed on November 7, 2019 was allowed.*
- ii. The judgment of the Court of Appeal sitting at Nairobi, September 27, 2019 was quashed and set aside.*
- iii. For the avoidance of doubt, the judgment of the High Court delivered on February 26, 2015, was upheld.*
- iv. Costs of the appeal to abide the appeal.*

Citations

Cases

Kenya

1. *Hamisi, Kakuta Maimai v Peris Pesu Tobiko & 2 others* Civil Appeal 154 of 2013; [2013] KECA 279 (KLR) - (Explained)
2. *In the Matter of Council of Governors & 47 others* Reference 3 of 2019 [2020] KESC 65 (KLR) (Civ) - (Applied)
3. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32 - (Explained)
4. *In the Matter of the National Land Commission* Advisory Opinion No 2 of 2014; [2015] eKLR - (Explained)
5. *Mate & another v Wambora & another* Petition 32 of 2014; [2017] KESC 1 (KLR) - (Explained)
6. *Rai & 3 others v Rai, Estate of & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 - (Explained)
7. *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others* Petition 368 of 2014; [2015] KEHC 6974 (KLR) - (Explained)
8. *Vuko, Samson Chembe v Nelson Kilumo & 2 others (the Registered Officials of Prisons Kiwandani Residential Upgrading CBO)* Civil Appeal 65 of 2015; [2016] KECA 541 (KLR) - (Explained)

Uganda

Sentiba Gordon & 2 others v Inspector of Government [2010] UGSC 30 - (Explained)

South Africa

1. *Democratic Alliance v Speaker of the National Assembly and others* [2016] ZACC 11 - (Explained)
2. *Economic Freedom Fighters v Speaker of the National Assembly and others* [2016] ZACC 11 - (Explained)
3. *SABC v DA* (393/2015) [2015] ZASCA 156 - (Explained)

Zanzibar

Selle & another v Associated Motorboat Company & others [1968] EA 123 - (Explained)

United Kingdom

R (Bradley) v Secretary of State for Work and Pensions [2008] EWCA Civ 36 - (Explained)

Texts

Garner, BA., (Ed) (), *Black's Law Dictionary* St Paul Minnesota: West Group

Statutes

Kenya

1. Appellate Jurisdiction Act (cap 9) section 3(2) - (Interpreted)
2. Commission on Administrative Justice Act (cap 7J) sections 2, 3, 5, 8(a)(b)(d)(g); 29; 30; 41; 42(4); 43(3); 44(4) - (Interpreted)
3. Constitution of Kenya articles 19, 22(1)(2); 47; 59,(2)(4)(5)(b)(h)(i)(j); 159(1)(4),(2); 163(4)(a); 165(5)(1)(2); 253; 254(1) - (Interpreted)
4. Court of Appeal Rules (cap 9 Sub Leg) rule 31 - (Interpreted)



5. Employment and Labour Relations Court Act (cap 8E) section 12(3) - (Interpreted)

JUDGMENT

Background

1. This Petition of Appeal is dated November 6, 2019 and was filed on November 7, 2019. The appellant has challenged the entire Judgment and orders of the Court of Appeal (Nambuye, Kiage & Murgor) at Nairobi in Civil Appeal No 141 of 2015 delivered on September 27, 2019.
2. This matter can be traced to the publication of Kenya Gazette Notice No 1386 of February 17, 2009 which established the Kenya Vision 2030 Delivery Board (“the Board”) to, inter alia, make policies, provide advice and overall leadership, oversight, guidance and policy direction in the implementation of the Vision 2030. As part of meeting its objectives, the Board placed an advertisement in the daily newspapers for the position of Director (Enablers and Macro) within its establishment. The 3rd respondent secured a three-year contract of employment for this position with the Board, effective March 23, 2009. Clause 6 of the contract provided for renewal of the contract six months to expiry, but subject to approval by the Board. Six months to the expiry of his contract, the 3rd respondent wrote to the Board requesting for a renewal of his contract. His request was rejected on the grounds that his performance was below par, and the contract was subsequently terminated through a decision dated March 23, 2012.
3. Aggrieved by the Board’s decision, the 3rd respondent appealed to the Minister for Planning and National Development and Vision 2030 (“the Minister”). The Minister renewed the 3rd respondent’s contract for a period of one year, but the Board declined to allow him back to work. As a result, the 3rd respondent sought the intervention of the 1st respondent, the Commission on Administrative Justice (CAJ).
4. After investigating the matter, CAJ in a report dated October 10, 2013 concluded, *inter alia*, that the Board had “impugned articles 47 and 59 of the Constitution and sections 2 and 8(a), (b) and (d) of the Commission of Administrative Justice Act on fair administrative action.” Consequently, the CAJ made recommendations to the Board to: pay the 3rd respondent an equivalent of twelve months salary and allowances in compensation for the one year period of the reviewed contract; facilitate the 3rd respondent to access his personal effects from his former office; and offer him an unconditional apology for the treatment meted out to him. The Board declined to implement CAJ’s recommendations prompting the 3rd respondent to file JR Case No 223 of 2014, *Republic v Kenya Vision 2030 Delivery Board & another ex-parte Eng Judah Abekah*.
5. At the High Court, the 3rd respondent sought an order of *mandamus* to compel the Board to comply with the recommendations of CAJ, compensation, and costs. The High Court identified three issues for determination as follows: Did CAJ have jurisdiction to determine the matter which had given rise to these proceedings? Can the decisions of CAJ be enforced by issuance of an order of *mandamus*? and Who should bear the costs of the proceedings?
6. On February 26, 2015, the High Court (W Korir, J), found that although CAJ had the powers to investigate the 3rd respondent’s claim, it could not compel the manner in which such recommendations, findings or reports could be implemented. In the Learned Judge’s opinion, in matters involving exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised. Ultimately, the learned judge found that CAJ does not have coercive powers over the



institutions that it investigates. The court found that where an organization refuses to implement the recommendations of CAJ, the only action the Commission can take is to make a report to the National Assembly. Thereafter, the National Assembly can take appropriate action pursuant to section 44(4) of the *Commission on Administration of Justice Act* (CAJA). With regard to costs, the court ordered each party to bear their own costs on the ground that even though the 3rd respondent's application had failed, it was not frivolous.

7. The judge concluded that since the Commission cannot compel a state agency to implement its recommendations, it follows that a court cannot compel a government agency to implement such recommendations through an order of *mandamus*. Further that the only exception where a court can compel a public agency to implement a recommendation is where "there is gross abuse of discretion, manifest injustice or palpable excess of authority" equivalent to denial of a settled right which the petitioner is entitled, and there is no other plain, speedy and accurate remedy." The trial court concluded that the 3rd respondent had not invoked that exception to warrant issuance an order of *mandamus*.
8. Aggrieved by the decision of the High Court, CAJ filed Civil Appeal No 141 of 2015, *Commission on Administrative Justice v Kenya Vision 2030 Delivery Board & 2 others*. The 3rd respondent also filed a cross-appeal. The learned judges of Appeal (Nambuye, Kiage & Murgor) framed four issues for determination as follows: whether CAJ had the mandate to intervene in the 3rd respondent's complaint; whether the Board is a public entity; whether the CAJ's request to the Board to implement its recommendations in favour of the 3rd respondent fell within the realm of performance of a public duty; and whether in the circumstances of the appeal, the Judge exercised his discretion judiciously when he dismissed the JR proceedings.
9. On September 27, 2019, the Court of Appeal allowed both the appeal and the cross-appeal. The appellate court granted the 3rd respondent's prayer for *mandamus* as was sought in the Judicial Review Application; declared that the 3rd respondent's right to fair administrative action was infringed and awarded him KES 700,000/= as compensation with interest from the date of Judgment of the High Court. The costs of appeal and cross-appeal were also awarded. In doing so, the Learned Judges of Appeal agreed with the trial Judge's finding only to the extent that CAJ had the powers to investigate the 3rd respondent's claim and make recommendations.
10. The court disagreed with the High Court's finding to the effect that the only remedy available to a beneficiary of CAJ's recommendations is limited to reporting of such findings to the National Assembly. The court found nothing in article 254 of the *Constitution* to suggest that such recommendations have no force of law and are therefore not amenable to enforcement by a court of law. It also found that the complaint raised by the 3rd respondent fell within the definition of administrative action as defined in section 2 of the CAJA as it related to the Board's failure to accede to the Minister's renewal of the 3rd respondent's contract, and the failure to accede to CAJ's request to convert the Minister's renewal of the said contract for one year to twelve (12) months' salary compensation together with other attendant remedies. The court emphasized that the Board's actions fell within the realm of public law and were therefore amenable to Judicial Review proceedings contrary to the findings of the Judge in the impugned decision.
11. Consequently, the court found that the 3rd respondent had demonstrated gross abuse of discretion, and that the Board was bound to implement the recommendations of CAJ.
12. Aggrieved by the finding of the Court of Appeal, the Board filed this appeal as of right pursuant to article 163(4)(a) of the *Constitution*. The Board raises three grounds of appeal summarized as follows:



- a. The appellate court incorrectly concluded that the recommendations of CAJ have the force of law and are binding on public bodies;
- b. The learned judges erred in law in holding that the fact that the Board did not challenge the action of the Minister in extending the 3rd respondent's contract or CAJ's recommendations, then the CAJ's recommendations are binding on it; and
- c. The learned judges erred by assessing damages in favour of the 3rd respondent when the High Court did not make any assessment of damages.

Parties Submissions

(a) The appellant

13. The Board submits that the Court of Appeal solely relied on article 254(1) of the *Constitution* and overlooked section 42(4) of the CAJA. In that context, the Board submits that article 254(1) of the *Constitution* was not relevant to the matter before the court as it relates to the general obligation of independent commissions to submit a report to the National Assembly at the end of each financial year. The Board contends that, pursuant to section 42(4) of the CAJA, the remedy where there has been non-compliance with the recommendations of CAJ, is for CAJ to prepare a report of the Board's failure to implement the recommendations to the National Assembly for appropriate action. Relying on the authority of *Samson Chembe Vuko v Nelson Kilumo & others* [2016] eKLR, the Board maintains that CAJ ought to have followed the procedure in the CAJA instead of seeking an order of *mandamus*.
14. Learned counsel for the Board further submits that in view of section 43(3) of the CAJA, CAJ's recommendations are not outrightly binding and that an order of *mandamus* will not issue where there is discretion on the public body to act or not to act. Furthermore, that there is no provision in the *Constitution* or in the CAJA that gives CAJ powers to enforce its decisions and recommendations as if they were a court order. In support of this argument, the Board cites the cases of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR, *R(Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36 (Pages 51 to 110) and *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR (pages 111 to 131). Learned Counsel also relied in the authority of *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)*, and SC Reference 3 of 2019; [2020] eKLR (In Re Council of Governors).
15. The Board furthermore submits that the recommendations of CAJ are not binding and that public bodies have no obligation to implement them and takes issue with CAJ's recommendations to compensate the 3rd respondent despite the Minister communicating to him that the extension of his contract had been declined. In that regard, the Board submits that the Court of Appeal converted what was a normal Judicial Review Application into a Constitutional petition.
16. It is also the board's submission that the 3rd respondent could not overlook or sidestep the laid down dispute resolution institutions such as the courts and go directly to CAJ for a determination of their grievance. Citing sections 8 and 30 of the CAJA, article 159(1) of the *Constitution*, the cases of *Sentiba Gordon & 2 others v Inspector of Government* (Civil Appeal No 06 of 2008) [2010] UGSC 30 and *In Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR, the Board urges that if the dispute between the parties was whether the 3rd respondent was entitled to the renewal of his employment, then the same ought to have been filed before the Employment and Labour Relations Court.



17. Lastly, the Board faults the Court of Appeal for proceeding to assess damages on its own motion instead of referring the matter back to the High Court for assessment of damages. The Board closes its submission by praying that the appeal be allowed with costs.

(b) The Attorney General

18. We note that the Attorney General did not file its written submissions. However, Ms Chilaka, appearing in person for the Attorney General on the date of the hearing, did associate herself with the submissions of the Board to the extent that CAJ's recommendations are not binding and therefore have no force of law.

(c) The 1st respondent

19. In response, CAJ argues that it can make recommendations to a public body concerned in an alleged violation and that those recommendations are binding by virtue of articles 19, 249(1), 22(1) &(2) and 59(2),(4), (5)(b), (h),(i) & (j) of the Constitution. CAJ maintains that in article 59(2)(e) and (j) of the Constitution, it does have the mandate to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated, report on complaints investigated under paragraphs (h) and (i) and take remedial action. CAJ also submits that, under section 8(d) of the CAJA, it has an obligation to report to the National Assembly bi-annually on the complaints investigated under paragraphs (a)and (b) and the remedial action taken thereon.
20. In that regard, CAJ argues that there are several ways through which it can achieve its mandate including recommendations, advisory opinions and proposals. Relying on the cases of SABC v DA (393/2015([2015] ZASCA 156, Economic Freedom Fighters v Speaker of the National Assembly and others Democratic Alliance v Speaker of the National Assembly and others [2016] ZACC 11, and Black's Law Dictionary, CAJ contends that it is empowered by the Constitution and the Act to make decisions that are compelling or binding on the public officers or bodies which are concerned in violations. It states that its action was equivalent to a remedial action and not a recommendation.
21. In response to the Board's submissions that the order of mandamus could not issue, CAJ submits that the Board had a public duty to comply with its decision and failure to do so entitled the 3rd respondent to an order of mandamus sought.
22. CAJ contends that it had jurisdiction to handle the 3rd respondent's complaint for renewal of his contract and that the process featured unfairness and irregularities which amounted to a breach of article 47 of the Constitution on the right to fair administrative action. CAJ maintains that it was created to compliment the court system and that chapter 4 of the Constitution does not set a hierarchy of jurisdiction of the courts *vis a vis* its mandate in dealing with complaints on violation of human rights. Consequently, CAJ prays that this court upholds the Court of Appeal's decision.

(d) The 3rd respondent

- (23) In opposing the appeal, the 3rd respondent, while citing articles 59, 159(4), 249(1) (2), 252, 22(1) & (2) of the Constitution and section 8 of the CAJA submits that CAJ 's recommendations have a binding character unless challenged by a legal process and are duly set aside or varied.
24. The 3rd respondent therefore submits that the Board and other public bodies have an obligation to implement the recommendations of CAJ unless challenged by a legal process and duly set aside or varied.



25. The 3rd respondent urges that CAJ is a part of constitutional dispute resolution mechanisms which are complementary to the court process. Further that the centrality of courts remains unchallenged considering that enforcement of recommendations of CAJ require judicial intervention.
26. Concerning the Court of Appeal's mandate to assess damages in favour of a party on appeal when the High Court did not do so, the 3rd respondent while citing section 3(2) of the *Appellate Jurisdiction Act*, rule 31 of the *Court of Appeal Rules*, and the case of *Selle & another v Associated Motor boat Company & others* [1968] EA 123, submits that the Court of Appeal did not err in assessing damages.

C. Issues for Determination

27. From the above submissions, the following issues crystalize for determination:
 - i. Whether the recommendations of CAJ are binding on public bodies and if public bodies have an obligation to implement CAJ's recommendations?
 - ii. Whether the Court of Appeal had jurisdiction to award damages?
 - iii. If the answer to (i) is in the affirmative, what are the appropriate reliefs?

(i) Whether the Recommendations of CAJ are Binding on Public Bodies?

28. CAJ is established under section 3 of the CAJA as a successor to the Public Complaints Standing Committee. The CAJA is an Act of Parliament to restructure the Kenya National Human Rights and Equality Commission Justice pursuant to article 59(4) of the *Constitution*. Regarding the powers of CAJ, section 5 of the CAJA specifically provides as follows:

“In addition to the powers of a Commission under article 253 of the *Constitution*, the Commission shall have power to—

- (a) acquire, hold, charge and dispose of movable and immovable property; and
- (b) do or perform all such other things or acts for the proper discharge of its functions under the *Constitution* and this Act as may lawfully be done or performed by a body corporate.”

Section 5 implies that the powers conferred upon CAJ are in addition to the power of commissions in article 253 of the *Constitution*. Article 253 of the *Constitution* makes provision for incorporation of Commissions, whilst article 254 of the *Constitution* makes provision for reporting by the same.

29. All constitutional Commissions and independent offices have an obligation under article 254(1) of the *Constitution*, “as soon as practicable, after the end of each financial year to submit a report to the President and to Parliament”. These reports may be limited to a particular issue. From the foregoing provisions, it is evident to us that the CAJA was to give effect to article 59(4) of the *Constitution*. CAJ is also bound by the provisions of article 254(1) of the *Constitution*. We therefore find fault in the Court of Appeal's conclusion that the reporting that is anticipated to be done by CAJ to Parliament, is separate or different from the reporting of its investigative report undertaken in discharge of its mandate in any given year. [30] Further, the CAJA is clear on the functions of the CAJ in the following terms:

“[8]. The functions of the Commission shall be to—



- (a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;
- (b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;
- (c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;
- (d) inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehavior, inefficiency or ineptitude within the public service;
- (e) facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;
- (f) work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;
- (g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;
- (h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;
- (i) publish periodic reports on the status of administrative justice in Kenya;
- (j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;
- (k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;
- (l) work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and
- (m) perform such other functions as may be prescribed by the Constitution and any other written law."

30. From the foregoing provisions, it is not contested that CAJ is mandated to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector. We therefore agree with both superior courts' finding that CAJ was mandated to entertain and make recommendations with regard to the 3rd respondent's complaint.



31. Under section 29 of the CAJA, once it has investigated a complaint arising from the carrying out of an administrative action of a public officer or any other public body, CAJ is under mandatory obligation to resolve the matter before it by conciliation, mediation or negotiation. If the matter cannot be resolved, and it determines that the administrative action was carried out unjustly or unreasonably, the CAJ shall make such recommendations as it deems fit.
32. Section 41 of the CAJA also provides for action to be taken by CAJ following an inquiry in the following terms:
- “The Commission may, upon inquiry into a complaint under this Act take any of the following steps—
- (a) where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;
 - (b) recommend to the complainant a course of other judicial redress which does not warrant an application under article 22 of the *Constitution*;
 - (c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation, other appropriate methods of settling the complaint or to obtain relief;
 - (d) provide a copy of the inquiry report to all interested parties; and
 - (e) submit summonses as it deems necessary in fulfilment of its mandate. “
33. Furthermore, under section 44 of the CAJA, where CAJ concludes that the person or State Organ or public office or organization being investigated is guilty of misconduct, it has an obligation to report the matter to the appropriate authority.
34. The bone of contention, then, is whether these recommendations are binding on such public bodies.
35. *In the Matter of the National Land Commission*, Advisory Opinion Reference 2 of 2014; [2015] eKLR, in her concurring opinion, Ndungu, SCJ, defined the words ‘recommend’, advise, research, investigate, encourage, assess, monitor and oversight’ to mean actions that provide a facilitative role rather than a primary one. In her opinion, the context in which those words are used, presumes that there is another body or organ whom such recommendations, advice, research, investigations, encouragement, and assessment shall be sent to, received by, and in relation to which the proposals shall be implemented. In her opinion, a body with oversight function, and a Body that implements the recommendations of the former, are different, and their roles do not overlap. For this reason, there is need for clear separation of roles between a body providing oversight, and a body upon which the oversight is to be conducted.
36. Also, *In Re Council of Governors*, this court defined a recommendation as follows:
- “(52) In our considered opinion, the term “recommendation” is the operational yardstick in this entire debate. In this regard, we agree with those who have submitted that this term should first and foremost, be accorded its literal and natural meaning. Towards this end, generally speaking, a recommendation is a suggestion or proposal, for a certain cause of action. Such proposal does not ordinarily bind the person to whom, or entity to which, it is addressed. It is for the recipient of a recommendation, to determine what import he should



attach to it. However, the categories of recommendations are never closed. Recommendations may differ, in their meaning, nature and effect, depending on the context in which they are deployed.”

37. On the binding nature of the recommendations by the Commission on Revenue Allocation, this court found as follows:

“60. Taking all these into account, it is our considered opinion that the recommendations by the Commission on Revenue Allocation are not binding upon either the National Assembly, or the Senate. What the two Houses cannot do however is to ignore or casually deal with such recommendations. To hold otherwise, would elevate the Commission above Parliament in the legislative chain. We therefore agree with both the Speaker of the National Assembly and the Law Society in their submissions to the effect that, it could not have been the intention of the makers of the Constitution to supplant the legislative authority of Parliament in matters Finance, by establishing the Commission on Revenue Allocation.” [emphasis added]

38. Similarly, *In Re Council of Governors*, this court was persuaded by the High Court decision *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others*, HC Constitutional Petition No 368 of 2014; [2015] eKLR, where Lenaola, J (as he then was) found that the recommendations addressed to all the 47 County Assemblies and County Executives, by the Commission on Revenue Allocation were not binding to the Senate but for good order, reasons for a deviation must be given.

39. From the foregoing Constitutional provisions, the statutory provisions and authorities highlighted, it is our finding that whereas CAJ has the requisite mandate to make recommendations to a public officer or a public body, the same is not binding. A recommendation can only be binding when the same is specifically provided for in the *Constitution* or in law. Neither the *Constitution* nor the CAJA states that CAJ’s recommendations are binding. Consequently, the Board had the discretion to determine the manner in which they were to implement CAJ’s recommendations. Towards that end, we find and affirm that the CAJ’s recommendations to *inter alia*: pay the 3rd respondent an equivalent of twelve months salary and allowances in compensation for a one-year period of the reviewed contract; facilitate the 3rd respondent to access his personal effects from his former office; and offer him an unconditional apology for the treatment meted out to him, were not binding upon the Board. We therefore fault the appellate court’s conclusion that CAJ’s recommendations were binding on the Board.

40. We agree with the Board’s submission and the High Court’s finding that under section 42(4) of the CAJA, the remedy where there has been non-compliance with the recommendations of the CAJ, is for the CAJ to prepare a report of the Board’s failure to implement the recommendations to the National Assembly for appropriate action. CAJ ought to have explored the options set out in section 41 of CAJA. Ultimately, we agree with the trial court’s finding that not even a court of law can dictate the manner in which a recommendation should be implemented. The only exception, as pointed by the trial court, is where “there is gross abuse of discretion, manifest injustice or palpable excess of authority” equivalent to denial of a settled right which the aggrieved party is entitled, and there is no other plain, speedy and accurate remedy.” It is our finding that the circumstances of the appellant’s case do not fit the said exception.

41. Even where such exceptional circumstances are pleaded, who then bears the burden of proving abuse of discretion? It is our opinion that where a party is so aggrieved by the exercise of discretion or lack of



it thereof, by a public office of officer or institution, it is for that party to prove that their case fits within the four corners of the exception set above. In the instant appeal, we agree with the trial court that the 3rd Respondent did not discharge this burden of proof. Mere allegation that the Board declined to comply with the CAJ's recommendation is not enough to prove gross abuse of discretion, manifest injustice or palpable excess authority.

42. We have observed that the question on the implementation of recommendations to public entities from Commissions has been recurring in different cases before this court and other superior courts. As such we are of the opinion that the following guiding principles ought to assist courts when considering a matter concerning the binding nature of recommendations from Commissions or other public bodies:

Guiding Principles on the recommendations from Commission to public bodies:

- a. Any power to make a recommendation ought to be specifically provided for in the Constitution or in law;
 - b. Recommendations do not necessarily bind the person to whom, or entity to which, it is addressed;
 - c. A recommendation from a Commission is only binding upon a public entity where it has been specifically provided for in the Constitution or in law;
 - d. The manner in which a recommendation is to be implemented by a Public entity is discretionary;
 - e. Exercise of discretion in implementing a recommendation may only be interfered where there is gross abuse of discretion, manifest injustice or palpable excess of authority
 - f. Any recommendation by a Commission which is not implemented may be reported to Parliament for any further action, if necessary;
43. We need to note at this juncture that Commissions are supposed to act as watchdogs and co-operate and work with government arms. It is the duty of Parliament to implement reports from commissions pursuant to article 254(1) of the Constitution and section 8 of the CAJA. Commissions therefore cannot implement their own recommendations nor force a recommendation on a public body lest they usurp the role of Parliament, which is the organ vested with the mandate to enforce implementation. For avoidance of doubt, a public office or body or state organ to whom a recommendation is made need not appeal against such a recommendation for it not to be binding on it.

(ii) Whether the Court of Appeal had jurisdiction to award damages?

44. The Court of Appeal allowed the 3rd respondent payment of twelve (12) months' salary as compensation *in lieu* of the one-year renewal of contract which the Board declined to accept; access to the office to collect personal effects, and an apology. Over and above that, the Court of Appeal awarded the 3rd respondent a sum of Kshs 700,000.00 upon its finding that his right to fair administrative action had been infringed by the Board.
45. The Board submits that CAJ did not have the mandate to award any relief to the 3rd respondent as it had declined to renew his contract, a decision communicated to him by the Minister. The Board faults the Court of Appeal for converting what was a normal Judicial Review Application into a constitutional petition and proceeding to award damages instead of referring the matter back to the



High Court. The Board also urges that the dispute between the parties was whether the 3rd respondent was entitled to the renewal of his employment and that the same ought to have been taken to the Employment and Labour Relations Court. On the contrary, CAJ and the 3rd Respondent submit that CAJ had the mandate to make the compensation and that the appellate court rightly awarded damages and compensation where none was made by the trial court.

46. Having found above that CAJ's recommendations did not bind the Board, it is our ultimate finding that there was no basis for the Court of Appeal to award compensation to the 3rd respondent. Although CAJ has the requisite mandate to award compensation under section 8(c) of the CAJA, (which section requires it to report to the National Assembly bi-annually on the complaints investigated and the remedial action taken thereon), it is our finding that section 8 of the Act cannot be read in isolation. It has to be read together with section 41 which provides for action taken by CAJ after an inquiry. Section 41 provides as follows:

“The Commission may, upon inquiry into a complaint under this Act take any of the following steps—

- a. where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;
- b. recommend to the complainant a course of other judicial redress which does not warrant an application under article 22 of the *Constitution*;
- c. recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation, other appropriate methods of settling the complaint or to obtain relief;
- d. provide a copy of the inquiry report to all interested parties; and
- e. submit summonses as it deems necessary in fulfilment of its mandate.”

47. In view of this, it is our finding that having concluded its investigation or inquiry on the 3rd respondent's claim, CAJ ought to either have referred the matter to the relevant authority (which in our opinion includes the National Assembly); or recommended to the 3rd respondent a course of other judicial redress; or recommend to the complainant appropriate methods of settling the complaint or to obtain relief; provide a copy of the inquiry report to all interested parties (in our opinion including the National Assembly) ; or submit summonses as it deems fit to fulfill its mandate.

48. Therefore, it is our finding that because the dispute between the 3rd respondent and the Board was an employer-employee dispute, CAJ ought to have recommended to the 3rd respondent the appropriate method of settling the dispute. In our opinion, one of the methods would have been seeking redress at the Employment and Labour Relations Court (ELRC) which is established to hear and determine disputes relating to employment and labour relations and for connected purposes. The ELRC has the power make appropriate remedies for the 3rd respondent pursuant to article 162(2) and 165(5) of the *Constitution* and section 12(3) of the *Employment and Labour Relations Act* including interim preservation orders; prohibitory order; an order of specific performance; a declaratory order; an award of compensation; an award of damages; an order of reinstatement among other.

49. CAJ cannot usurp the role of the ELRC over employment disputes and award compensation. CAJ, under section 8(g) of the CAJA, can only recommend compensation or other appropriate remedies against a person or bodies to which the Act applies. Having found elsewhere in this Judgment that



recommendations can only be binding where specifically provided for, we conclude that CAJ lacks the requisite jurisdiction to award compensation in the circumstances. In other words, even if CAJ recommends compensation after concluding its inquiry, there is an additional step or action to be taken by the entity or person to whom the recommendation has been made. That entity or person may or not implement the same depending on the manner on how they choose to exercise their discretion, unless otherwise provided for in the law. Consequently, we set aside the reliefs awarded by the Court of Appeal.

50. On costs, this court has previously settled the law on this issue, stating that costs follow the event in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012; [2014] eKLR and that a court has the discretion in awarding costs in its decision. This remains the law. In the instant case, we award costs of this appeal to the Board.

51. Consequently, we allow the appeal.

D. Orders

52. Ultimately, upon our finding above, the final orders are that:

1. The Petition of Appeal dated November 6, 2019 and filed on November 7, 2019 be and is hereby allowed.
2. The Judgment of the Court of Appeal sitting at Nairobi, dated September 27, 2019 is hereby quashed and set aside.
3. For the avoidance of doubt, the Judgment of the High Court delivered on February 26, 2015, be and is hereby upheld.
4. Costs of this appeal to abide the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2021.

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P. M. MWILU

Ag. CHIEF JUSTICE & Ag. PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA



JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

